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DECISION

CASE No. 2011-113

POSTING DATE: May 16, 2011

MAILING DATE: May 16, 2011

MAILING DATE: May 16, 2011

MAILING DATE: May 16, 2011

MMO subsequently filed a Motion to Dismiss the protest, and Holseberg was afforded an opportunity to respond. Based on the official procurement file and the applicable law, the CPO has conducted an administrative review without a hearing.

Holseberg's letter of protest is attached and incorporated herein by reference.

DISCUSSION

Section 11-35-4210(1)(b) of the Code reads in relevant part:

Any actual bidder...who is aggrieved in connection with the intended award or award of a contract shall protest to the appropriate chief procurement officer...within ten days of the date award or notification of intent to award, whichever is earlier, is posted in accordance with this code; **except that a matter that could have been raised pursuant to (a) as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract.** (Emphasis added)

Instead Section 11-35-4210(1)(a) of the Code provides:

A prospective bidder...who is aggrieved in connection with the solicitation of a contract shall protest to the appropriate chief procurement officer...**within fifteen days of the date of issuance of the Invitation for Bids...or any amendment to it,** if the amendment is at issue. (Emphasis added.)

In other words, a bidder cannot simply “wait until after he loses the contract to complain” about the solicitation. Protest of The Computer Group, South Carolina Procurement Review Panel (“Panel”) Case No. 1992-6. If a bidder alleges defects in the solicitation, he or she must protest within the time limits for protesting the solicitation. Id. Moreover, a matter that could have been raised as a protest of the solicitation may not be raised as a protest of the award. See Section 11-35-4210(1)(b). Generally, a protest on an issue raised by the solicitation documents is considered a protest of the solicitation. See Protest by AMDAHL Corp. & International Business Machines Corp., Panel Case No. 1986-6 (finding that allegations regarding determinations made in the IFB were protests of the solicitation documents and should have been raised when the specifications were published.) Examples include allegations that the specifications are unduly restrictive¹ or that the solicitation unfairly favors one vendor over another.²

¹ Protest of Cambex Corp., Panel Case No. 1992-7

² See generally, Protest of J&T Tech, Inc., Panel Case No. 1987-3

The Panel has held that the time for filing cannot be waived. See In Re: Protest of Jones Engineering Sales, Inc., Panel Case No. 2001-8 (finding that the CPO did not have jurisdiction to rule on the protest issue because the time for filing protests of the solicitation is jurisdictional and may not be waived); In Re: Protest of National Cosmetology Ass'n, Panel Case No. 1996-17 (finding that “where the appeal is not taken within the time provided, jurisdiction cannot be conferred by consent or by waiver”). The Panel has explained its rationale for why this time limit is jurisdictional and cannot be waived as follows:

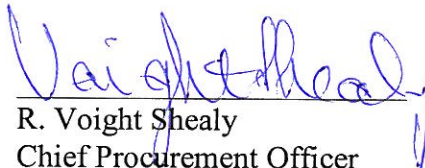
[I]t is essential to the operation of government that challenges its purchasing decisions be limited. If the time for filing protests can be waived, the state will be unable to determine with certainty when it can enter into a contract with one vendor for vital goods and services without the danger of being liable to another vendor.

In Re: Protest of Oakland Janitorial Services, Inc., Panel Case No. 1988-13.

In this case, Holseberg’s entire protest letter raises issues concerning the solicitation. Since Holseberg could have raised these issues in a protest of the solicitation, it had to file a protest within the time constraints of Section 11-35-4210(1)(a) of the Code, not Section 11-35-4210(1)(b). The IFB was issued on February 4, 2011. On February 10, 2011, MMO issued the only amendment, which effectively republished the solicitation. Even if the amendment was at issue and the designated period of time began to run on the latter of these two dates, any protest was due to the CPO by at least February 25, 2011. Holseberg filed its protest letter with the CPO on March 11, 2011, which was well after the deadline to protest the solicitation had expired. Therefore, Holseberg filed its protest beyond the time allowed under the Code. Accordingly, the CPO does not have the authority to hear this protest, and this protest must be dismissed as untimely filed.

DETERMINATION

For the aforementioned reason, the protest is dismissed.³


R. Voight Shealy
Chief Procurement Officer
for Supplies and Services

May 16, 2011
Columbia, SC.

³ Although MMO also moved to dismiss the protest on the ground that it failed to state any violation of law, the CPO finds that it is unnecessary to rule on this ground since the untimeliness finding is dispositive. Furthermore, to the extent that Hulseberg also attempted to recharacterize or raise additional allegations in its response to the motion, those issues are also untimely raised. Protest of DP Consultants, Panel Case No. 1998-6 (finding “[t]he protest letters establish the issues of the case, and any issues not established in the protest letter are untimely...”)

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised October 2010)

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2010 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2010 S.C. Act No. 291, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).

Skinner, Gail

From: Protest-MMO
Sent: Friday, March 11, 2011 9:01 AM
To: _MMO - Procurement; Shealy, Voight; Skinner, Gail
Subject: FW: Protest on Contract Number 4400003374

From: Sarah Holseberg[SMTP:SHOLSEBERG@GMAIL.COM]
Sent: Friday, March 11, 2011 9:00:59 AM
To: Protest-MMO
Subject: Protest on Contract Number 4400003374
Auto forwarded by a Rule

Holseberg Industries is protesting the pending award on Solicitation Number 5400002693. We believe the solicitation was defective and unreasonable due to the following restrictions. The solicitation requires the use of Certified Carbon Fabric Prepreg, BMS 8-276 TY 40 Cl 2 or 2A Form 1 6K-70-PW and Certified Carbon Unitape Prepreg, BMS 8-276 TY 35 Cl 10 Gr190 form 3 materials. However, crucial pricing information on the required materials is restricted to pre-approved Boeing vendors. Generally a vendor is automatically approved once a solicitation is awarded to them by Boeing. Since Holseberg Industries has not been previously awarded a Boeing solicitation, we were not able to obtain the actual cost of the required materials. This meant we were at a disadvantage and had to estimate the material costs. This solicitation unfairly favors current Boeing suppliers.

If the solicitation was only open to pre-approved vendors or if the material costs were made available, then the solicitation would have equal grounds for all bidding. However, this was not the case, the solicitation was open to everyone, but not everyone could accurately bid on it. Our final prices submitted were based on speculative costs of the required material.

On top of the restrictive cost information, the solicitation only allows for 30 days initial start up time, when the required material has a lead time of 120 days. Since it is not possible to "stock" the certified material (because it expires and then loses its "certification" quickly), this time restriction is unreasonable, as the lead time is out of the vendors control.

If the state would be less restrictive in the material requirements or make the prices public, it would allow for equal opportunity among the bidders. Then the solicitation would be impartial and Holseberg Industries would be able to submit an accurate bid based on the correct material costs.